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UNITED STATES DISTRICT COURT

10 FOR THE CENTRAL DISTRICT OF CALIFORNIA

11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 v.
14

CHAD EDWARD LARSON CZISNY,

15 Defendant.
16

No. SA CR 15-24-CJC

OPPOSITION TO DEFENDANT'S MOTION
FOR JUDICIAL RECOMMENDATION OF
MAXIMUM RRC PLACEMENT

17
18 Plaintiff United States of America, by and through its counsel
19 of record, the United States Attorney for the Central District of
20 California and Assistant United States Attorney Anne C. Gannon,
21 hereby files this opposition to defendant's Motion of Judicial
22 Recommendation of Maximum RRC Placement. As explained in the
23 attached Memorandum of Points and Authorities, this motion should be
24 dismissed for lack of jurisdiction and failure to exhaust the
25 administrative remedy process.

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1 This opposition is based on the attached memorandum of points
2 and authorities, the files and records in this case, and such other
3 evidence or argument as may be requested by the Court.

4 Dated: April 21, 2020

Respectfully submitted,

5 NICOLA T. HANNA
6 United States Attorney
7 BENJAMIN R. BARRON
8 Assistant United States Attorney
9 Chief, Santa Ana Branch Office

10 /s/

11 ANNE C. GANNON
12 Assistant United States Attorney

13 Attorneys for Respondent
14 UNITED STATES OF AMERICA
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MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

Defendant Chad Edward Larson Czisny ("Defendant"), Register Number 68827-112, an inmate in the custody of the Federal Bureau of Prisons ("BOP"), mailed to the Court the instant Motion for Judicial Recommendation for Maximum RRC Placement dated March 3, 2020 ("Motion"). (Docket #135.) On April 7, 2020, the Court docketed the Motion with a filed date of March 9, 2020. Petitioner requests that this Court order or recommend to the BOP that defendant be placed in a residential re-entry center ("RRC") for the maximum term of 12 months at the end of his custodial sentence. Motion at 1-3.

This Court should dismiss the Motion because this Court lacks jurisdiction to consider the Motion as Congress has specifically exempted the BOP's placement decisions from judicial review. Defendant has also failed to exhaust his administrative remedies regarding this issue.

II. STATEMENT OF FACTS**A. Petitioner's Background**

Defendant is currently serving an 84-month term of imprisonment as a result of his convictions for Possession with Intent to Distribute Heroin, in violation of 21 U.S.C. § 841 and 21 U.S.C. § 841(b)(1)(B)(i); Felon in Possession of Firearm and Ammunition in violation of 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(a)(2); Bank Fraud, in violation of 18 U.S.C. § 1344; Attempted Bank Fraud, in violation of 18 U.S.C. § 1344; and Aggravated Identity Theft, in violation of 18 U.S.C. § 1028A(a)(1). (Docket #131.) Defendant is currently housed at the FCI Terminal Island. www.bop.gov (inmate finder search as of April 20, 2020). Defendant's current projected

1 release date is July 29, 2021, assuming he earns all remaining
2 available good time conduct credit. Id.

3 **B. Statutory Background**

4 Two statutes define and constrain the BOP's obligation and
5 authority to determine inmate placement while in BOP custody: 18
6 U.S.C. §§ 3621(b) and 3624(c). See Sacora v. Thomas, 628 F.3d 1059,
7 1061-62 (9th Cir. 2010).

8 The BOP makes inmate placement determinations throughout an
9 inmate's incarceration. Under 18 U.S.C. § 3621(b), the BOP has
10 authority to designate the place of an inmate's imprisonment and to
11 direct the transfer of a prisoner from one penal or correctional
12 facility to another "at any time." Rodriguez v. Smith, 541 F.3d
13 1180, 1182, 1185 (9th Cir. 2008). Under 3621(b), the BOP is required
14 to take into account numerous considerations when designating the
15 place of a prisoner's imprisonment.

16 The BOP also makes "end of sentence" inmate placement
17 determinations. Under § 3624(c), the BOP evaluates inmates for RRC
18 placement when they are 17 to 19 months from release. Sacora, 628
19 F.3d at 1064. Such placements are made to prepare prisoners for re-
20 entry into the community. Id. at 1062. The BOP considers the same
21 § 3621(b) factors when making these "end of sentence" RRC placements
22 pursuant to § 3624(c). 18 U.S.C. § 3624(c)(6)(A); Sacora, 628 F.3d
23 at 1062.

24 Thus, these statutes contemplate that sentencing courts may make
25 recommendations regarding the appropriate "type of penal or
26 correctional facility," to which the BOP will designate a defendant
27 for service of a term of imprisonment. 18 U.S.C. § 3621(b)(4)(B).
28 The BOP, however, retains the statutory authority and responsibility

1 to choose the "place of imprisonment from among 'any' available penal
2 or correctional institution." Goldings v. Winn, 383 F.3d 17, 25 (1st
3 Cir. 2004). Moreover,

4 [a]ny order, recommendation, or request by a sentencing
5 court that a convicted person serve a term of imprisonment
6 in a community corrections facility shall have no binding
7 effect on the authority of the Bureau under this section to
8 determine or change the place of imprisonment of that
9 person. Notwithstanding any other provision of law, a
10 designation of a place of imprisonment under this
11 subsection is not reviewable by any court.

12 18 U.S.C. § 3621(b).¹ "The BOP has plenary control, subject to
13 statutory constraints, over 'the place of the prisoner's
14 imprisonment.' . . . A sentencing court can recommend that the BOP
15 place an offender in a particular facility or program. [citation] But
16 decisionmaking authority rests with the BOP." Tapia v. United
17 States, 564 U.S. 319, 331 (2011). Thus, no court may review or
18 second-guess the BOP's discretionary placement decisions made
19 pursuant to §§ 3621 and 3624. Reeb v. Thomas, 636 F.3d 1224, 1226-28
20 (9th Cir. 2011) (reviewing BOP's individualized placement decisions
21 would be contrary to the "plain language" of § 3625 exempting such
22 placement decisions from judicial review).

23 **III. ARGUMENT**

24 **A. Individualized, Discretionary Determinations Regarding** 25 **Placement Are Not Subject to Judicial Review**

26 Defendant requests that this Court issue an order recommending
27 to BOP that defendant be placed in an RRC for 12 months, the maximum
28 time permitted by statute. Petition at 1. To the extent the Motion
is a request for an order to BOP, contrary to BOP's individualized,
discretionary decision regarding defendant's RRC placement it should

¹ The final sentence of 18 U.S.C. § 3621(b) was added by the
First Step Act ("FSA") which became effective on December 29, 2018.

1 be dismissed for lack of subject matter jurisdiction. In the
2 alternative, if it is a request for an amendment of defendant's
3 sentence to include a recommendation regarding the length of RRC
4 placement, this Court lacks jurisdiction because the request involves
5 neither a clear error nor a government motion to reduce defendant's
6 sentence based on substantial assistance. Fed.R.Crim.P. 35.

7 1. The Decision Whether to Place an Inmate in an RRC Is
8 Not Subject to Judicial Review

9 Petitioner's challenge to the BOP's ongoing decisions regarding
10 his placement, including the decision of whether, when, and for what
11 duration to place Petitioner in an RRC is not subject to judicial
12 review. First, in the FSA, Congress expressly exempted such
13 decisions from judicial review. 18 U.S.C. § 3621(b). Even before
14 the statute was amended, controlling authority exempted those sorts
15 of individualized placement decisions from judicial review. The
16 Ninth Circuit's decision in Reeb is dispositive. In that case, an
17 inmate challenged his expulsion from the BOP's residential drug abuse
18 program ("RDAP"). Reeb, 636 F.3d at 1226. The Ninth Circuit held
19 that "[t]o find that prisoners can bring habeas petitions under 28
20 U.S.C. § 2241 to challenge the BOP's discretionary determinations
21 made pursuant to 18 U.S.C. § 3621 would be inconsistent with the
22 language of 18 U.S.C. § 3625." Id. at 1227. Thus, the Ninth Circuit
23 held that courts lack subject matter jurisdiction over any habeas
24 petition alleging only that the BOP "erred in [a] particular case,"
25 that is, made an individual placement decision with which a prisoner
26 takes issue. Id.

27 Because the BOP's authority and discretion to place an inmate in
28 an RRC near the end of his sentence is derived from 18 U.S.C. §§ 3621

1 and 3624, that decision as well is beyond the scope of judicial
2 review, for the same reason RDAP placement decisions are
3 unreviewable. See Brown v. Sanders, 2011 WL 4899919, at *2 n.3 (C.D.
4 Cal. Sept. 1, 2011) ("Although Reeb involved a determination
5 regarding [RDAP] as opposed to a CCC or home detention, the
6 difference is immaterial as the RDAP determination is also made
7 pursuant to § 3621."), aff'd sub. nom Brown v. Ives, 543 F. App'x 636
8 (9th Cir. 2013). The language of § 3625 is not ambiguous; rather, it
9 clearly forecloses judicial review of "'any determination, decision,
10 or order' made pursuant to 18 U.S.C. 3621-3624." Reeb, 636 F.3d at
11 1227 (emphasis added) (quoting 18 U.S.C. § 3625). In other words,
12 the BOP alone may make the discretionary placement determinations
13 contemplated by §§ 3621 and 3624, including any decision regarding
14 RRC placement. See Tapia v. United States, 564 U.S. 319, 331 (2011)
15 ("[T]he BOP has plenary control, subject to statutory constraints,
16 over 'the place of the prisoner's imprisonment,' § 3621(b), and the
17 treatment programs (if any) in which he may participate, §§ 3621(e),
18 (f); § 3624(f). A sentencing court can recommend that the BOP place
19 an offender in a particular facility or program. But decision making
20 authority rests with the BOP." (some citations omitted)); see also,
21 e.g., Brown, 543 F. App'x at 637 (no judicial review over individual
22 RRC placement decisions); Caldwell v. Sanders, 2013 WL 1124712, at
23 *1-2 (C.D. Cal. Jan. 23, 2013) (same), adopted by 2013 WL 1124695
24 (C.D. Cal. Mar. 18, 2013); Ingram v. Thomas, 2011 WL 1791234, at *4
25 (D. Or. May 10, 2011) (same); Espinosa v. Rios, 2011 WL 4084365 at
26 *3-4 (E.D. Cal. Sept. 13, 2011) (same).

27 Accordingly, because Defendant's motion amounts to nothing more
28 than an prospective request for judicial review of the BOP's

1 individualized, discretionary determination regarding inmate
2 placement, the decision is simply not subject to judicial review at
3 all. Defendant's challenge to that decision should thus be dismissed
4 for lack of subject matter jurisdiction.

5 2. Defendant Failed to Exhaust the Administrative Remedy
6 Process

7 This Petition should also be dismissed because Defendant has
8 failed to demonstrate that he has exhausted available administrative
9 remedies. The BOP administrative remedy procedures include a
10 process whereby inmates may seek a formal review of any aspect of
11 their confinement. 28 C.F.R. §§ 542.10-542.19. The inmate must
12 first seek informal resolution of the issue of concern at their
13 institution of confinement. Id. § 542.13(a). If that fails, the
14 inmate must file a formal request with the Warden. Id. § 542.14. If
15 the Warden denies a remedy, the inmate may then appeal first to the
16 Regional Director, within 20 days of receiving the Warden's response,
17 and then to the General Counsel in Washington, D.C. Id. § 542.15.
18 Pursuant to 28 C.F.R. § 542.15(a), an "[a]ppel to the General
19 Counsel is the final administrative appeal." Thus, the
20 administrative process is not complete until the Office of the
21 General Counsel replies, on the merits, to the inmate's appeal. See
22 28 C.F.R. § 542.18.

23 While defendant's request is styled as a motion, it effectively
24 is a petition for writ of habeas corpus. "Federal prisoners are
25 required to exhaust their federal administrative remedies prior to
26 bringing a petition for a writ of habeas corpus in federal court."
27 Martinez v. Roberts, 804 F.2d 570, 571 (9th Cir. 1986). The
28 exhaustion requirement aids judicial review by allowing the

1 administrative agency to develop a factual record, apply its
2 expertise, and correct its own errors, thereby conserving court
3 resources and avoiding unnecessary judicial intervention. See
4 Ruwiwat v. Smith, 701 F.2d 844, 845 (9th Cir. 1983). The failure to
5 exhaust administrative remedies is an appropriate basis for dismissal
6 of a habeas petition. Martinez, 804 F.2d at 571.

7 Here, Defendant has failed to demonstrate that he has exhausted
8 the administrative remedy process regarding his request for RRC
9 placement. Accordingly, to conserve judicial resources, and
10 discourage circumvention of the administrative remedy process, the
11 Motion should be dismissed, allowing defendant to pursue his request
12 administratively. This failure to exhaust the administrative remedy
13 process is an appropriate basis for dismissal of this motion.
14 Defendant should be required to exhaust the administrative remedy
15 process before proceeding in litigation.

16 **IV. CONCLUSION**

17 For the foregoing reasons, the government respectfully requests
18 that this Court dismiss defendant's motion.

19
20 Dated: April 21, 2020

Respectfully submitted,

21 NICOLA T. HANNA
22 United States Attorney
23 BENJAMIN R. BARRON
24 Assistant United States Attorney
25 Chief, Santa Ana Branch Office

26 /s/
27 ANNE C. GANNON
28 Assistant United States Attorney

Attorneys for Respondent
UNITED STATES OF AMERICA

Certificate of Service

I am a citizen of the United States and am employed in the County of Orange, California. I am over 18 years of age, and I am not a party to the above-entitled action. My business address is the United States Attorney's Office, Ronald Reagan Federal Building and United States Courthouse, 411 West Fourth Street, Suite 8000, Santa Ana, California 92701.

That I am employed by the United States Attorney for the Central District of California, who is a member of the Bar of the United States District Court for the Central District of California, at whose direction the service was made. On this date, April 21, 2020, I served a copy of the foregoing document(s), described as follows: **Opposition to Defendant's Motion for Judicial Recommendation for Maximum RRC Placement** in the following manner:

☐ by placing a true copy in a sealed envelope, addressed to the person(s) specified below, and placing it for interoffice delivery within the courthouse to:

☒ by placing the documents in a sealed envelope, bearing the requisite postage thereon, and placing it for mailing via the U.S. Postal Service addressed as follows:

Chad Edward Larson Czisny
Register No. 68827-112
Federal Correctional Institution
Terminal Island
P.O. Box 3007
San Pedro, CA 90733-3007

☐ by e-mailing a pdf. version of the document(s) to the e-mail Address specified below:

I declare under penalty of perjury that the foregoing is true and correct, executed on April 21, 2020, at Santa Ana, California.

/s/ Linda Bennett
Linda Bennett